

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

At all relevant times, Plaintiff Anthony J. Burriola (Plaintiff) was an inmate in custody of the Nevada Department of Corrections (NDOC). (Pl.'s Am. Compl. (Doc. # 15) 1.)¹ The events giving rise to this action took place while Plaintiff was housed at Lovelock Correctional Center (LCC) and Southern Desert Correctional Center (SDCC). (*Id.*) Plaintiff, a *pro se* litigant, brings this action pursuant to 42 U.S.C. § 1983. (*Id.*) Defendants are Skolnik, Bannister, Helling, Palmer, Chambers, McClellan, East, Waters, Emmanuel, Burson, Childress, Griggs, Williams, and Garcia. (Screening Order (Doc. # 19) at 4.)

On February 23, 2012, Plaintiff filed a Petition for Writ of Replevin. (Doc. # 39.) In response, Defendants filed a Notice to the Court of Plaintiff's Improper and Fraudulent Filing, or in the alternative, Motion for Enlargement of Time to Respond to Plaintiff's Petition for Writ of Replevin. (Doc. # 41.)

In support of his petition, Plaintiff filed various exhibits, including a purported handwritten affidavit of Karen Jenkins. (*See* Doc. # 39-1 at 3-4.) Ms. Jenkins is a correctional officer at Lovelock Correctional Center (LCC). Plaintiff's affidavit asserts that Apollyon

¹Refers to court's docket number.

1 Anthony Abaddon² is an authorized representative of Karen Jenkins. (*Id.* at 3.) The affidavit
2 purports to admit certain wrongful conduct with respect to the personal property that is the
3 subject of Plaintiff's petition. (*Id.* at 3-4.) Specifically, the affidavit asserts that Karen Jenkins
4 retaliated against Plaintiff by requiring him to destroy legal and property. (*Id.*) The affidavit
5 represents that it is made under penalty of perjury. (*See id.* at 37, referencing 28 U.S.C. §
6 1746.)

7 Defendants assert that Plaintiff has improperly represented the alleged authorization
8 for "Abaddon" to make an affidavit on behalf of Correctional Officer Jenkins. (Doc. # 41 at 2.)
9 Defendants urged the court to *sua sponte* assess sanctions against Plaintiff under Federal Rule
10 of Civil Procedure 11 (c) (3). (*Id.* at 3.) If the court declines to do so, Defendants assert that
11 they will follow the directive of Rule 11's safe harbor provision, and proceed with a motion for
12 sanctions under Rule 11. (*Id.*)

13 On March 27, 2012, the court issued an order directing Defendants to file a declaration
14 of Ms. Jenkins explaining Defendants' position with respect to the alleged fraudulent affidavit.
15 (Doc. # 44.)

16 On March 29, 2012, Defendants filed a Declaration of Ms. Jenkins in compliance with
17 the court's order. (Doc. # 45.)

18 Ms. Jenkins, whose name is Donna Jenkins, and not Karen Jenkins, is employed as a
19 Correctional Officer at Lovelock Correctional Center (LCC). (Doc. # 45-1 at ¶ 1.) She has
20 reviewed the purported affidavit of Karen Jenkins filed by Plaintiff, and declares that she is the
21 person Plaintiff mistakenly refers to as Karen Jenkins in the affidavit. (*Id.* at ¶¶ 6-7.)
22 Ms. Jenkins confirms that she did not authorize Plaintiff to make an affidavit on her behalf,
23 and his representation that she did is false. (*Id.* at ¶ 8.) Nor did she authorize Plaintiff to forge
24 her signature on the affidavit. (*Id.* at ¶ 9.) Finally, she asserts that the factual assertions
25 contained in the affidavit are false. (*Id.* at ¶ 10.)

26 Rule 11 provides in pertinent part:
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² It appears that Apollyon Anthony Abaddon is an alias used by Plaintiff. (*See* Doc. # 39 at 1.)

1 By presenting to the court a pleading, written motion, or other paper-whether by
 2 signing, filing, submitting, or later advocating it-an attorney or unrepresented
 3 party certifies that to the best of the person's knowledge, information, and belief,
 formed after an inquiry reasonable under the circumstances:

4 (1) it is not being presented for any improper purpose, such as to harass,
 cause unnecessary delay, or needlessly increase the cost of litigation;

5 (2) the claims, defenses, and other legal contentions are warranted by
 existing law or by a nonfrivolous argument for extending, modifying, or reversing
 existing law or for establishing new law;

6 (3) the factual contentions have evidentiary support or, if specifically so
 identified, will likely have evidentiary support after a reasonable opportunity for
 7 further investigation or discovery; and

8 (4) the denials of factual contentions are warranted on the evidence or, if
 specifically so identified, are reasonably based on belief or a lack of information.

9 Fed. R. Civ. P. 11(b). Under Rule 11(c)(1), "after notice and a reasonable opportunity to
 10 respond, the court determines that Rule 11(b) has been violated, the court may impose an
 11 appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible
 12 for the violation." Fed. R. Civ. P. 11(c)(1). The court may do so on its own initiative by issuing
 13 an order "to show cause why conduct specifically described in the order has not violated Rule
 14 11 (b)." Fed. R. Civ. P. 11(c)(3).

15 Rule 11 further instructs that, "[a] sanction imposed under this rule must be limited to
 16 what suffices to deter repetition of the conduct or comparable conduct by others similarly
 17 situated." Fed. R. Civ. P. 11(c)(4).

18 Apart from Rule 11, the court has inherent authority to issue sanctions. *See Chambers*
 19 *v. NASCO, Inc.*, 501 U.S. 32, 43-46 (1991); *Fink v. Gomez*, 239 F.3d 989, 991 (9th Cir. 2001).
 20 The court's "inherent power 'extends to a full range of litigation abuses.'" *Fink*, 239 F.3d at 992
 21 (quoting *Chambers*, 501 U.S. at 46-47). The imposition of sanctions under the court's inherent
 22 power is discretionary. *Air Separation, Inc. v. Underwriters at Lloyd's of London*, 45 F.3d
 23 288, 291 (9th Cir. 1995). "Because of their very potency, inherent powers must be exercised
 24 with restraint and discretion." *Chambers*, 501 U.S. at 44 (citation omitted). Imposing sanctions
 25 under the court's inherent power requires "a finding of bad faith or conduct, or conduct
 26 tantamount to bad faith." *Gomez v. Vernon*, 255 F.3d 1118, 1134 (9th Cir. 2001).


27 "A primary aspect of that discretion is the ability to fashion an appropriate sanction for
 28 conduct which abuses the judicial process...[O]utright dismissal of a lawsuit...is a particularly

1 severe sanction, yet is within the court's discretion." *Chambers*, 501 U.S. at 44-45 (citation
2 omitted). "[C]ourts have inherent power to dismiss an action when a party has willfully
3 deceived the court and engaged in conduct utterly inconsistent with the orderly administration
4 of justice." *Wyle v. R.J. Reynolds Industries, Inc.*, 709 F.2d 585, 589 (9th Cir. 1983) (citation
5 omitted). The Ninth Circuit has also held that falsifying evidence is a ground for imposing the
6 sanction of dismissal. *See Combs v. Rockwell Int'l Corp.*, 927 F.2d 486, 488 (9th Cir. 1991).

7 The court agrees with Defendants that drafting and filing with the court an affidavit
8 under penalty or perjury that admits to wrongful conduct on behalf of another person is
9 particularly egregious. However, the court must afford Plaintiff an opportunity to respond to
10 the conduct which is asserted to violate Rule 11 or may constitute bad faith invoking the court's
11 inherent authority to impose sanctions. Therefore, Plaintiff has **UP TO AND INCLUDING**
12 **APRIL 23, 2012** to file a **response** to Defendants' Notice to the Court of Plaintiff's Improper
13 and Fraudulent Filing (Doc. # 41) and the Declaration of Donna Jenkins (Doc. # 45-1). In
14 addition to a possible violation of Rule 11 of the Federal Rules of Civil Procedure, the court
15 notes that the subject conduct may amount to a crime, and Plaintiff should be mindful of his
16 Fifth Amendment right against self incrimination when filing his response, if any.

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18 **IT IS SO ORDERED.**

19 DATED: April 2, 2012

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21 WILLIAM G. COBB
22 UNITED STATES MAGISTRATE JUDGE
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